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CASE_____

IN THE SUPREME COURT
OF THE UNITED STATES

EDUARDO E ROJAS ------PETITIONER

vs

IONICS,INC. ET.AL.,------RESPONDENTS

On Petition for writ of certiorari to the United States courts of appeals for the first circuit

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Petition for Writ of Certiorari

EDUARDO E ROJAS

PRO-SE

5889 SW. 19 ST. MIAMI, FL, 33155

TEL. 305 265 8582

30 pp

QUESTION PRESENTED FOR REVIEW

(a) Whether the determination by the Federal courts violates the constitutional rights of Petitioner article IV section 1

LIST OF PARTIES

All parties do not appear in the Caption of the case on the cover page

A list of all parties to the proceeding in the court whose judgement is the subject of this Petition is as follows.

ARTHUR D GOLDSTEIN. Chief Executive Officer

STEPHEN KORN. Administrator, General counsel

MARIANNE M WINSSER. Human Resource Manager

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

OFFICIAL REPORT OF THE OPINION AND

ORDERS ENTERED IN THE CASE BY COURTS

(a) The Judgement of the United States Court of Appeals appears at
Appendix A to the petition and is unpublished.

(b) The Memorandum and order of the United States District Court appears at
Appendix B to the petition and is unpublished.

(c) The report and recommendation of District Court Magistrate Judge appears at
Appendix C to the petition and is unpublished.

BASIS FOR JURISDICTION IN THE COURT

(i) The judgement to be reviewed was entered on June 20 2002

This petition is filed under this court's rule 11.

(ii The statutory provision believed to confer on this court jurisdiction to review on a writ of certiorari the judgement or order in question is USC.28 section 1253

(iii) The Defendants attorney on record has been notified by Mail.

(iv) The USC.28 and 2403 may apply

CONSTITUTIONAL PROVISIONS
STATUTES

USC 29 section 623 (f)(2) :

[No such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any Individual, and no such Employee plan shall require or permit the involuntary retirement of any individual
specified by section 631(a). of this title.]

USC 29 section 626 (f) (1) ----------OWBPA

[An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2) a waiver may not be considered knowing and voluntary unless at a minimum

(A) The waiver is part of an agreement between the individual and the Employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate.

(B) The waiver specifically refers to rights or claims arising under this act.

(C) [The individual does not waive rights or claims that may arise after the waiver is executed.]

(D)[The individual waives rights or claims only in exchange for consideration in addition to anything of value to which the Individual already is entitled]

(E)The individual is advise in writing to consult with an attorney prior to executing the agreement.]

USC.29 section 633(b).

[In the case of an alleged unlawful practice ocurring in a state which has a law prohibiting discrimination in Employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been earlier terminated: Provided, That such sixty days period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirements for the comencement of such proceedings is imposed by State Authoriy other than the requirement of the filing of a written and signed statement of the facts upon which procceding shall be deemed to have commenced for the purposes of this subsection at the time such statement is sent by registered Mail to the appropiate State Authority.]

STATE STATUTES PROVISIONS

M.G.L. ch 149 Section 24B.

[Any provision in any contract., or agreement or understanding entered into on or after September first, 1984, which shall prevent the private sector employment of any person over the age of forty because of his age, except as permitted by Subsection 17 of section 4 of chapter 151B shall be null or void.]

M.G.L. ch 151 B Section 4 (17) (a).
It shall not be an unlawful employment practice for any person, employer labor organization or Employment agency to.

(a)[Observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement , pension, or insurance plan, which is not a subterfuge to evade the purposes of this section, except that no such employee benefit plan shall excuse the failure to hire any person, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any person because of age except as permitted by paragraph (b).]
[Paragraph (b) is for bona fide executive]

M.G.L.ch 151 Section 19 (4)

[No person shall, for the purpose of evading this chapter, establish any arrangement or organization in his business, by CONTRACT , lease or agreement, whether written or oral , whereby a person who would otherwise be his Employee does not have the status of such employee]

M.G.L. ch 260 Section 2A.Three years ; actions of tort, contract for recover for personal injuries and replevin.

[Section 2A. Except as otherwise provided,actions of tort, actions of contract to recover for personal injuries, and actions of replevin, shall be commenced only within three years next after the cause of action.]

M.G.L. ch 260 Section 2. Six years

[Section 2 Action of contract, other than those to recover for personal injuries, founded upon contracts or liabilities, express or implied, except actions limited by section one or actions upon judgements or decrees of courts of record of the United States or of this or of any other state of the United States, shall except as otherwise provided, be commenced only within six years next after the cause of action accrues.]

M.G.L. 149 section 148B

[For the purpose of this chapter, individual performing
any service , except as authorize under this chapter, shall be deemed to be Employees under this section unless it is shown that : such an individual has been and will continue to be free from control and direction in connection with the performance of such services under his contract; and such service is performed either outside of all places of business of the enterprise; and , such Individual is customarily engaged in an independently established occupation, profession or business of the same nature as that involved in the service performed. The failure to withhold Federal or State Income taxes, unemployment conpemsation or workers compensation from an employee wages shall not be used for the purposes of making a determination under this section. The President and treasurer of a corporation and any officer or agent having the management of such corporation shall be deemed the Employer within the meaning of this section]

M.G.L. chapter 151A section 6A (6). Services not included in "employment".

[Section 6A The term "employment" shall not include service performed by an individual in the employ of the commonwealth or any of its instrumentality's or any political subdivision thereof

or any of its instrumentality's or any instrumentality of any of the foregoing and one or more states or political subdivisions of such individual performed such service as :

(6)an employee serving in a position which , under or pursuant to the laws of the commonwealth is appointed to either a nontenured policymaker or advisor,or in a policymaking or advisory position the performance of the duties of which ordinarily does not require more than EIGHT HOURS per week.]

M.G.L. ch 260 Section 13
Acknoledgment or new promise; Effect.

No acknowledgment or promise shall be evidence of a new or continuing contract whereby to take an contract out of operation of this Chapter or to deprive a party of the benefit thereof, unless such acknowledgment or promise has been made by, or is contained in , a writing signed by the party chargeable thereby.

CASE STATEMENT

Respondent triggers this complaint when on December 1994 classified the Employee (Petitioner) an independent Contractor after Earlier retirement. However ,continued paying Employee wages, disallowed 35 days of sick leave, recalled an Stock Option agreement illegally taken 2400 shares, Misrepresented Petitioner to avoid payment of Social securities taxes and Worker Compensation Insurance, then fired Petitioner when questioned about the illegality of their action.

1.) Petitioner brought charges under Breach of Fiduciary, Breach of Contract Misrepresentation, and Discrimination.

2.) The district Court Dismissed Breach of fiduciary and contract on tort and untimely, Misrepresentation for noncomplying with proper state law, and Discrimination for not complying with State procedure.

The Court of Appeal affirmed.

3.) The opinion and the Judgement of the federal courts are in conflict with existing states and federal laws . bringing the question whether the constitutional rights of petitioner have been violated

BASES FOR FEDERAL JURISDICTION

The Federal jurisdiction is pursuant to USC.28 Section 1332.

ARGUMENT

Statement

Petitioner asserts that under USC 28 section 1654 it is his constitutional right to conduit his own case personal by the rules of the court within its jurisdiction . However these rules do not imply that Petitioner shall know the law nor the remedies, and that duty is for the court and the judges conducting the case .

It is the obligation of Petitioner to present The Evidences and reason to believe that his Employment Rights under the law were violate resulting in Material Damage. and it is the Duty of the court in the name of justice to Construe liberally his allegations ,or allow leave to amend a complaint

freely in the absence of undue delay , bad faith , undue prejudice to the opposing party, repeated failure to cure deficiencies ,or futility.

see Forman v Davis , 371 U.S. 178,182, (1962).

Petitioner asked for leave to amend the Complain to add new charges that had to be processed with the State and repair the pleading base on the new findings. However this was denied on the bases that it was futile to allow it.

BREACH OF CONTRACT

1.) The Stock option Agreement of 1991 and 1993 is a covenant Governed by and construed in accordance with the Laws of Massachusetts. for a term of 10 years and one day. and Subject to

M.G.L ch 110A (Trade Regulation) as per the Stock Option Agreement paragraph 7 and 13. (Appendix E)

2.) Respondents failing to comply with OWBPA under an Employment earlier retirement agreement, converted the Petitioner into an Independent contractor in violation of States Laws M.G.L. ch. 149 section 24B. ch 151 Section 19(4),and Federal USC.29section 623 (f)(2) . 60 days later instructed Petitioner (verbally) to exercise his vested Options as a result of not longer being a key Engineer. Petitioner exercised 1600 vested shares and 2400 shares remained nonvested.

3.)At this very first point , because the Respondents had violated the States and federals law, to impose an status of Employment not of employee, with view to take his fringe benefits. and his rights

as an employee, that could have been considered a tort. However what is being argued whether Respondents had the right to " Claim " the Stock option contracts of 1991 and 1993 . under the same unlawful scheme, and without complying with the requirements of the OWBP act of 1990.It is clear by the evidence presented . That Respondents never complied with any document under the provision of the OWBPA. that would have given the right to claim the contract. Those arguments were presented by petitioner to the lower courts among other arguments reasoning why the decision taken by the lower courts is unjust and in conflict with State and Federal laws. and decisions made in other similar cases.

some of the Material is essential to understand the Petition and its included in the Appendix section D.

Appellan Original brief Sections:
[(Statement of Issues, of the case and Facts)
(The Stock Option Agreement) (Breach of Contract)]

Appellant Reply brief Sections:
[(Breach of Fiduciary) (Breach of Contract)
and (Discrimination)]

4.) Because Petitioner was retained by Respondents to work and Suffer ,It was irrelevant what Employment statute he had. The evidence presented is that Petitioner did complied with the agreement. and by law it was the obligation of Respondents to honor the agreement as a former Employee . The Options would be vested on 1996 ,1997 and 1998, The IRS determination [1] had not been made until February 2000. The District Judge erred in using the 1997 Memo to start accruing time, when in fact, Petitioner still had nonvested units according to Respondent

" Korn " Memo of February 1998. In which the Respondent compare the result of having kept the options and exercise it on February of 1998. when it would be vested completely. In fact it is clear that the memo of 1997 is rather a breach of contract by claiming that it was within their the right to recall the Stock Options in 1995 , thus in violation of the agreement par 6,7, 8,12 and 13. and claiming that Petitioner was not longer an Employee .

5.) the statement of this Memorandum is relevant that Respondent Korn was noticing Petitioner that the action of the corporation was consistent with the stock option agreement and Plan. However it is also a fact that Respondents in 1994 or 1995 did not advance that information to Petitioner bringing the

question whether Respondents have the right to claim this contractual agreement without complying with the OWBP act of 1990 and its requirements.

see [Oubre v Energy Operations,Inc 522 U.S. 422 (1998).]

7.) Respondents were Liable for the 2400 shares that were offered to Petitioner under the Stock Option agreement of 1991 and 1993. at the prize that it would have been convenient to Petitioner to exercise the Options . but Respondents in Violation of the Stock Option agreement Paragraph 7and 8 (appendix E) and violation of the Uniform Security act M.G.L. ch 110A section 101. did not allowed to do it, in 1997 or 1998. by using illegal methods and engaging in an act that would operate as a Fraud. or deceit under this chapter.

8.)The Court failed to recognize that the Stock Options Contract is govern and construe to the Law of Massachusetts.and paragraph 7 of the agreement must comply with the securities laws. of the State which is under M.G.L. chapter 110A .

Chapter 110A section 101 Said :

[It is unlawful for any person , in connection with the offer , sale or purchase of any security, directly or indirectly.]

(1)[To employ any device , scheme or artifice to defraud.]

(2)[to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement made , in the light of the circumstances under which they are made , not misleading]

(3)[to engage in any act, practice , or course of business which operates or would operate as a fraud or deceit upon any person.]

9.) Also ; Under chapter 110A section 410 (e) .

[No person may sue under this section more than four years (4) after discovery by the person bringing the violation of this chapter or any rule promulgated or order issued thereunder.]

10.) The Lower court erred taking the suggested remedies by the Respondents , which of course would be bias to dismiss the case on a tort action base on a three years Statute, and under a law used for contract for recover for personal injuries and replevin. M.G.L. ch 260 section 2A. when the proper remedy for this type of action would be M.G.L. ch 260 Section 2. which is for actions other than those to recover for personal injuries, founded upon contracts or liabilities, express or implied. see [Ansin v River Oaks Furniture First Circuit 96-1734 (1996)] (Appendix D 3)

Therefore the dismissal of this case is in Conflict With the State Laws for liability on contract action, with the State Securities contract laws , and the Federal retirement laws USC 29 section 626(f)(1) and a Decision made by the First District court on similar case .

[The District court view of this action is on page 28 through 34 on the Report and recommendation on Defendant Ionics , Inc. Motion to Dismiss Plaintiff's Amended Complaint. (# 15)]

---

[1][Although Petitioner was determine by the IRS an Independent contractor for tax purposes , the states do not recognize that statute under chapter 149 section 148B. and a consultant position is that of an Employee when is advisory position is more than 8 hrs per week. under chapter 151A: section 6A (6)]

DISCRIMINATION

1.) Petitioner did filed properly with the EEOC office in Miami Florida.an under the new sharing agreement between States and EEOC. a copy was sent to the Local office or Florida Comm. on human relations, not to Massachusetts. about 30 days after, a notice of dismissal with right to suit was sent to Petitioner. The Discrimination charge was entered on February 8 of 2001.The procedure was consistent with USC 29 Section 633(b) and within the timing allowed by law.

2.)The court of appeal erred in dismissing this claim without consideration of this court view on similar cases. and mentioned in the appealing Arguments.

[Astoria Federal S.&.L. Ass'n. v Solimino,501 US 104 (1991)]

[Oscar Mayer co v Evans 441 U.S. 750 (1970)]

This Argument has been extensively covered on page 12 through 16 on petitioner Appellant reply Brief dated January 24 of 2002. (Appendix section D3)

However the lower courts have a different opinion as shown on pages 36 ,37,38 and 39 of the Report and Recommendation of Defendant Ionics, Incorporated 's Motion to Dismiss Plaintiff's Amended Complaint (#15).

REASON FOR GRANTING THE PETITION

1.)[This Employment dispute is of great Importance to Thousands of Retirees Who ordinarily, remain working after taken their pension in a lump Sum. and classified as Consultant. Many with Stock options not yet vested , and accumulated Sick leave that would be needed in the years ahead. and not Knowing if States and federals laws would protect their previous contracts rights when Retiring and not properly informed under the OWBP Act.]

2.) A United States court of appeals has entered a decision in conflict with a decision made on the same important matter on a similar case.

3.) A United States court of appeals has decided an important Federal question in a way that conflicts with relevant decisions of this court.

CONCLUSION

For the reasons given in this Petition for a Writ of Certiorari, Petitioner Eduardo E Rojas request in the name of justices, that this court grant the petition.

RELIEF SOUGHT

Petitioner has suffered Material Damage in excess of $162,000, therefore Petitioner is seeking the proper relief granted by law and aproprite sum of money damages ascertained by the court with interest, cost and any other relief deems proper and just

Respectfully Submitted on September 12 of 2002

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CASE_____

IN THE SUPREME COURT
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EDUARDO E ROJAS ------PETITIONER

vs

IONICS,INC. ET.AL.,------RESPONDENTS

On Petition for writ of certiorari to the United States courts of appeals for the first circuit

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Appendix to Petition for Writ of Certiorari

Volume I

EDUARDO E ROJAS

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52 PP

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APPENDIX A

JUDGEMENT OF FIRST CIRCUIT

COURT OF APPEAL

United States Court of Appeals
For the First Circuit

No. 01-2505

EDUARDO E. ROJAS,

Plaintiff, Appellant,

V.

IONICS, INC., ET AL.,

Defendants, Appellees.

Before

Boudin, Chief Judge,
Torruella and Lipez, Circuit Judges.

JUDGEMENT

ENTERED ; JUNE 20, 2002

JUDGMENT

Entered: June 20, 2002

We have carefully reviewed the record in this case, including the briefs of the parties. We affirm the dismissal of the complaint, essentially for the reasons given by the magistrate judge in his report and recommendation, dated June 14, 2001, and by the district judge in his memorandum and order, dated September 5, 2001

Affirmed

by the Court:

Richard Cushing Donovan, Clerk

By: **JANICE M. O'NEIL**
Chief Deputy Clerk.

[cc: Mr. Rojas, Ms. Mercier, Certified Copies to: Honorable Mark Wolf and Mr. Anastas, Clerk, U.S. District Court of MA.]

APPENDIX B

MEMORANDUM AND ORDER

FIRST DISTRICT COURT

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EDUARDO E. ROJAS,)
Plaintiff,)
v) C.A. No. 00-12376-MLW
IONICS, INC., ET AL.,)
Defendant.

DOCKETED

MEMORANDUM AND ORDER

WOLF, D.J. September 5, 2001

On June 14, 2001, the Magistrate Judge issued a 25-page Report and Recommendation analyzing Defendant Ionics Inc.'s ("Ionics"), Motion to Dismiss the Amended Complaint and recommending that the motion be allowed. The court has carefully considered the Report and Recommendation, plaintiff Eduardo E. Rojas' original, pro se objections and his supplemental memorandum, which replies to Ionics' Opposition to Plaintiff's Objections and its opposition to Rojas' request to amend his complaint again.

The Report and Recommendation is persuasive and, therefore, is being adopted. As more fully set forth in the Report and Recommendation, the reasons for this decision are as follows. Rojas acknowledges that Count 3 of the Amended Compl .is not meritorious because M.G.L. c. 93A does not provide remedy for employment disputes. With regard to Count 1, even assuming, without finding, that Ionics owed a fiduciary duty to Rojas which is very doubtful his claim of a breach of that duty is barred by t.he three-year statute of limitations applicable to tort claims established by Massachusetts law. See M.G.L. c. 260, § 2A. Count 2 alleges, at best, a tort claim rather than a contract claim. Therefore, Count 2 is also barred by the three-year statute of limitations. Finally, as explained by the Magistrate Judge and by Ionics in its Opposition, even if Count 4 is construed as a claim made pursuant to M.G.L. c. 151B, it must be dismissed because Rojas failed to comply with the procedural requirements of that statute and, although they are not jurisdictional, there is not a valid reason to excuse Rojas' failure to satisfy those procedural requirements.

Rojas' request to amend his complaint again is also being denied. Because Rojas is representing himself, the court has liberally construed his pleadings. Nevertheless, it clearly appears that any possible amendment would be futile because the claims that Rojas seeks to allege are time-barred. Moreover, Rojas has been previously permitted to respond to a motion to dismiss by amending his complaint. It would not be in the interest of justice to allow him to do so again. Accordingly, it is hereby ORDERED that defendant Ionics Inc.'s Motion to Dismiss the Amended Complaint (Docket No. 15) is ALLOWED and plaintiff Eduardo Rojas' request to amend his complaint again is DENIED.'

"s/ MARK L WOLF " D.J.
UNITED STATES DISTRICT COURT

'The Amended Complaint also names three individual defendants. The docket indicates that none of them has been served. In any event, it appears that each would have at least the meritorious bases for dismissal that Ionics has asserted.

APPENDIX C

REPORT AND RECOMENDATION

FIRST DISTRICT COURT

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EDUARDO E. ROJAS,
Plaintiff,

v. CIVIL ACTION NO. 00-12376-MLW

IONICS, INC.,
Defendant.

REPORT AND RECOMMENDATION ON DEFENDANT IONICS, INCORPORATED'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT (#15)

COLLINGS, Ch.U.S.M.J.

I. INTRODUCTION

On November 16, 2000, *prose* plaintiff Eduardo E. Rojas ("Rojas") filed a threecount complaint (#1) naming as parties defendant Ionics, Inc. ("Tonics"), Arthur Goldstein ("Goldstein"), Stephn I ("Korn"), and Marianne Winsser ("Winsser").[1] Ionics, a Massachusetts corporation, is the plaintiffs former employer; the three individually named defendants are employed by Ionics as the Chief Executive Officer, General Counsel and Human Resource Manager respectively.

In lieu of answering the complaint, Ionics filed a motion to dismiss, together with a memorandum in support, on January 4, 2001.2 (##3,4)

Eighteen days later Rojas submitted a document entitled "plaintiff (sic) motion to dismiss defendants (sic) counter claim motion" (#7) and a supporting memorandum of law (#8) in opposition to Ionics' dispositive motion. On February 7, 2001, the plaintiff filed a motion to amend the complaint which was allowed shortly thereafter by the District Judge to whom this case is assigned. In the amended complaint (~14), Rojas deleted one of the previously alleged claims[3] and added two more counts.

Ionics has again moved to dismiss (#15) and has filed a supplemental memorandum of law addressing the two new claims. (#17) Rojas has

1 Although not listed as parties in the caption, the trio of individuals were clearly identified as defendants in the introductory paragraphs of the original complaint.

2 From all that appears to date only the corporate defendant has been served with process. (#2)

3 The claim for misrepresentation was eliminated in the amended complaint.

countered the defendant's motion with a document entitled "plaintiff (sic) motion to dismiss defendants (sic) counter claim on amended complaint" (#19) and a memorandum of law. With the record now complete, the motion to dismiss the amended complaint is in a posture for resolution. This motion has been referred to the undersigned for issuance of a report and recommendation as to disposition pursuant to 28 U.S.C. §636(b).

II. The Facts

In a recent iteration the First Circuit explained the applicable standard as follows:

> A district court's allowance of motion to dismiss pursuant to Fed.R.Civ.P. 12~b)(6) is reviewed de novo. *Bessette v. Avco Fin. Sen's.,* Inc., 230 F.3d 439, 443 (1st Cir.2000). Like the district court, we must accept as true the factual allegations of the complaint and draw all reasonable inferences in favor of [the plaintiff]. *See id.* We will affirm the dismissal "only if, under the facts alleged, the plaintiff cannot recover on any viable theory." *Id.* (quoting *Garita Hotel Ltd. P'ship v. Ponce Fed. Bank,* 958 F.2d 15, 17 (1st Cir.1992) (internal quotation marks omitted)).

Blackstone Realty LLC v. F.D.I.C., 244 F.3d 193, 197 (1 Cir., 2001)(footnote omitted).

The place to begin is with a review of the allegations of the amended complaint.

In early September of 1967 Rojas accepted employment as a transformer designer in the engineering department of Ionics.[4] (#14 ¶8) Some twenty-four years later, in or around October, 1991, and then again in September, 1993,the plaintiff was granted certain stock options in accordance with the 1979 Stock Option Plan adopted by Ionics. (#14 ¶9, Exh. 2A and 2B)

According to Rojas, in early December of 1994 he was encouraged by a Mr. Kachadurian, then an executive vice president of Ionics, to retire early in order to take advantage of a lump sum pension which would be larger at that time than if he waited until what would be his normal retirement

two and a half years hence. (#14 ¶10) Mr. Kachadurian also offered the plaintiff a position with Ionics as a consultant after he retired at a salary of three thousand dollars a month for half time work plus health insurance and travel expenses. (#14 ¶11, Exh. 3) On or about December 16, 1994, defendant Winsser, Human Resources manager at Ionics, gave Rojas a Retiree

[4] The plaintiff actually alleges that he entered into an employment contract with the defendant at that time, referencing a letter from Ionics to him appended to the amended complaint as Exhibit 1.

The plaintiff references numerous documents throughout the amended complaint and has appended them as exhibits thereto. The First Circuit's lead shall be followed with respect to these documents: "Pursuant to Fed.R.Civ.P. 10(c), we treat these exhibits as ~a part [of the pleading] for all purposes,' including Fed.R.Civ.P. 12(b)(6). *McCaUion v. Lane,* 937 F.2d 694,696 (1st Cit. 1991)." *Black~tone Realty,* 244 F.3d at 195.

Distribution Election form to read and sign. (#14 ¶12. Exh. 4)

In February of 1995, Mr. Kachadurian advised the plaintiff that he had better exercise his vested options or he would lose them. (#14 ¶13) According to Rojas, Mr. Kachadurian explained that this action was necessary because the plaintiff was no longer a key employee. (#14 ¶13) Some eight months later Rojas wrote the following memorandum to defendant Goldstein:

THE REASON FOR THIS LETTER IS TO CLEAR UP SOMETHING THAT HAS BEEN ANNOYING ME SINCE I CHANGED MY STATUS OF EMPLOYMENT.

IN 1991 AND IN 1993 I WAS ISSUED 1000 SHARES.I ASSUMED THIS WAS A FORM OF COMPENSATION FOR MY DEDICATION TO THE COMPANY. THEN IN 1994 I DECIDED TO SEMI-RETIRE IN WHICH (SIC) I WAS INFORMED TO EXERCISE NON-RECALLABLE STOCK OPTIONS. I EXERCISED 600 SHARES FROM 1991, 200 SHARES FROM 1993 AND I LOST THE REST.

THE TERMS AND CONDITIONS STATE THAT THE SHARES ARE DISALLOWED ONCE AN EMPLOYEE IS FIRED OR LEAVES THE COMPANY. I REMAINWORKING FOR THE COMPANY PART-TIME AND ALSO FULL-TIME WHEN NEEDED.

MY CONCERN IS THAT I WAS AWARDED FOR MY MERITS LATE IN MY TIME AND IT WAS TAKEN AWAY BECAUSE I RETIRED AFTER 27 YEARS OF SERVICE. I FEEL THIS IS UNFAIR AND I ASK IF YOU COULD PLEASE LOOK INTO THIS MATTER AND SEE IF IT IS CONSISTENT WITH THE CORPORATION'S STOCK OPTION AGREEMENT.

Amended Complaint ~14 ¶14, Exh. 5.

Defendant Korn responded to the plaintiffs memo on January 8, 1997:

Ed

At Art's [Goldsteinl request, I have taken a look at the issues you raised. The facts, as I understand them are these: when you voluntarily retired from employment with the Company in 1994, you ceased your employment relationship with Ionics. If you

had remained an employee, you would not have been able to withdraw your funds from the Retirement Plan, as you did at the time.>

The work you have done for the Company since you retired has been as an independent contractor through your company, not as an employee (therefore there are no tax withholdings taken from your pay), and our stock option plan is available only to key employees. The shares remaining unexercised upon your retirement were still covered by the Company's buy-back rights, and we have an SPI which provides that if an employee voluntarily retires before normal retirement age, the Company will exercise its buy-back rights. Therefore, your treatment was consistent with the stock option plan, your stock option agreement and the SPI. Please let me know if you need any further information.

Amended Complaint #14 ¶15, Exh. 6.

More than six months thereafter in late July, 1997,

Rojas replied in writing to Korn:

Stephen:

I am taking this opportunity that work has slowed down a bit to discuss my early retirement and stock option issue.

I understand that there are some rules applicable to the option plan and if we go by these rules you are right.

Nevertheless, there are a few points that I want to discuss:

A. Prior to my retirement, 15 December 1994, I consulted with personnel about my advantages and disadvantages to retire early. All the facts were given to me. However, the stock options were not mentioned. They did not advise me that I had to exercise my stock options.

To my surprise, in January 1995, your Executive Vice-President Mr. Kachadurian informed me that I had to exercise my options or loose (sic) them. If I had know this I would not have retired..'~

B.My work as a contractor.
After I retired in December 1994,
Mr.Kachadurian offered me two options:

1. Twenty-eight weeks lump sum severance pay or
2. A three year contract at a rate of $3000 a month for one half time. No benefits, except. health insurance, travel expenses.

I accepted the contract option.

Amended Complaint ~14, ¶16, Exh. 7.

In January of 1998, Rojas, Goldstein, Korn and Winsser held a meeting. (#14 ¶17) During that meeting the plaintiff expressed his displeasure with the decision made by Goldstein in 1994, consequent to which he lost his stock options and other benefits. (#14 Cl7) Goldstein explained that once Rojas had retired he had ceased to be an employee of and thus had no right to the stock options. (#14 ¶18) In Goldstein's view, the plaintiff had done better financially by taking the early retirement

even with the loss of the stock options, but he agreed to look into the matter and make an adjustment if in fact the opposite was true. (#14 ¶18) When the investigation was completed, Korn wrote a letter dated February 5, 1998 to Rojas, wherein he wrote in pertinent part:

> As Art [Goldstein] promised you, Marianne Manzon Winsser and I have reviewed the history of your decision to retire as an active employee at the end of 1994 and the consequences of that decision to you and your financial position.
>
> The attached sheet was prepared to illustrate the fact that the primary economic benefit you obtained as a result of your early retirement use of a very favorable discount rate to establish your lump sum retirement distribution, plus early receipt of that distribution more than outweighed your giving up non-vested stock options for 2,400 shares.
>
> I must therefore conclude that the additional benefits you received from retiring in 1994 are greater than the value of the options you gave up.

Moreover, the additional benefit you were given of having to pay only the employee contribution, and not the full COBRA amount, during the 18 months of COBRA coverage following your retirement was equivalent to paying you an additional S3,700 in benefits not normally paid to a retiree.

In conclusion, it is clear you made an appropriate economic decision when you took an early retirement and gave up certain options. Furthermore, our review has shown, and I think you will agree, that Ionics had treated you more than fairly, in a way that valued and recognized your long and dedicated years of service.

Amended Complaint #14 ¶19, Exh. 8.

Approximately one year later, upon hearing rumors that he would not be given any further work assignments, the plaintiff contacted the IRS and was advised to file an SS8 form. (#14 ¶20) Rojas did so in July of 1999, forwarding to the IRS the form

as well as proof of his relationship with, and the work done for, Ionics from 1995 through February, 1999. (#14 ¶21, Exh. 9A-E and 10) The IRS determined that Rojas was an independent contractor vis-a-vis Ionics, and so informed him by letter dated February 10, 2000. (#14 ¶22, Exh. 11) Based on the IRS determination, the plaintiff sent an invoice to the treasurer of Ionics seeking an upward adjustment in the rates he had billed from December of 1994 until February of 1999. (#14 ¶23, Exh. 12) According to Rojas, he had billed Ionics at a lower, employee rate throughout that period rather than at a higher, independent contractor rate. (#14 ¶23, Exh. 12)

In or around June of 2000, the plaintiff was in contact with other workers from Ionics who had retired at about the same time as he had, who had also taken a lump sum retirement and then continued to work part-time, but who were classified as employees as opposed to independent contractors. (#14 ¶24) In early July, 2000, Rojas authored another letter to Goldstein which reads, in part,

Dear Art:

As a result of further investigation about my earlier retirement in December 1994 and its handling by the administration, I have come to the conclusion that

1 I was improperly informed of certain retirement benefits.

2 Improperly advice (sic) as to the exercising of stock options

3 and Improperly treated as an employee during my work after early retirement.

For the last few years while being employed by Ionics, I have tried to reason with you and the administration, and I have gotten nothing but frustration and pain seeing that after 30 years of dedication and honesty to the company, the Management including you toss me away, refusing to give me what I have earned~

Once more I do beg you to look seriously into this problem and realize that if there is not an agreement to pay my benefits as it stand (sic) today, in the next 15 DAYS I have no choice but to initiate a lawsuit against the COMPANY.

Amended Complaint #14 ¶25, Exh. 13.

A little over one week later, defendant Korn

responded on behalf of defendant Goldstein,

Stating inter alia that:

The fact is that you voluntarily ceased your employment relationship with Ionics at the end of 1994. You could not have received your retirement benefits if you had remained an employee, and you chose to retire when you did in order to maximize your retirement benefits. The work you performed for Ionics since 1994 was as an independent contractor, as confirmed by the IRS.

Far from acting in bad faith, Ionics tried to assist you by permitting you to work as an independent contractor even after you retired and took your Retirement Plan benefits. The fact that your stock options would no longer be exercisable after you ended your employment relationship was dearly set forth in your stock option agreements and in the stock option plan, a copy of which you received with each of the option agreements. Ionics owes you no further obligations.

Amended Complaint #14 ¶26-8, Exh. 14.

The plaintiff alleges that Ionics invoked a lot of excuses, for example, that he was no longer a key employee after retirement, so as to avoid giving him his stock options. (#14 ¶29) It is contended that "[a]ll these excuses confirm that the Defendant had Misrepresented (sic) and mislead the Plaintiff with the Intention (sic) to defraud him." (#14 ¶30) Rojas claims that he had a right to be classified

and maintained as an employee after his retirement as had other employees who had retired without stock options. (#14 ¶31) The company's view that the plaintiff was an independent contractor is a "pretext" unsupported by a contract or appropriate rates of pay according to Rojas. (#14 page 32-35)

Lastly the plaintiff advances the following allegations:

> If Mr. Kachadurian perpetuated this action of Fraud (sic) in 1994, it could have Been (sic) resolved in 1996, or January 1998 when the plaintiff asked for the Remaining (sic) 2400 shares vested, but the Administration rather than recognize the error or Negligence (sic) it went on with an excuse, good enough to hide the Bad (sic) faith and malice Whether (sic) the Motive (sic) was cause by Reprisal (sic), for being associated to Mr. Kachadurian .

> Racial (sic), because the Spanish background of the Plaintiff, or Age (sic), which may have Been not the Motive (sic) but it could be very well the difference as the Plaintiff (sic) age was Under (sic) the federal and State protective rules of law.
>
> Regardless what the Motive (sic) was the Action (sic) of the Defendant has been willful With(sic) reckless disregard to Massachusetts and federal Discrimination (sic) law. With The Intention (sic) to take away what truly belongs to him.

Amended Complaint #14 ¶36-7.

With a review of the allegations complete, it is time to turn to the claims advanced.

III. The Amended Complaint

In Count I of the amended complaint, the plaintiff asserts a claim for breach of fiduciary duty

Although not specifically stated, it is apparent from

the context of the allegations that the time at which this purported breach occurred was in December, 1994, i.e., when Rojas took an early retirement at the age of sixty-three and a half. (#14 ¶41) The plaintiff claims that he did not become an independent contractor then, but rather that his employment status with Ionics remained the same "and as[s] such the Stock Option agreement was in force." (#14 ¶42) It is alleged that "[the defendant breached his (sic) fiduciary obligation in not notifying the Plaintiff ever [t]hat it was recalling the [o]ptions and terminating the contract in writing". [7] (#14¶43, 45)

7 The citation to assertion of the uniform Commercial Code, Mass. Gen .Lc 106, & 1-205 (6), in support of this legal proposition is , of course, inapposite. There is no commercial transaction at issue in this case.

Next in Count II it is alleged that the defendant breached the covenant of good faith and fair dealing implied in the option agreement. (#14 ¶47) More particularly, Rojas contends that Ionics breached the stock option agreement "under false pretense and in [violation of sections (sic) 10(b) of the stock option plan [b]y denying the Plaintiff [t]he right to the status on employment (sic) [w]hich was arbitrarily and illegally taken [a]way as result (sic) of early withdraw (sic) of pension fund." (#14 ¶**50**)[8]

[8] The citation to a section of the Uniform Commercial Code, Mass. Gen. L. c. 106, §1-205(6). in support of this legal proposition is, of course, inapposite. There is no commercial transaction at issue in this case.

Again the citation to the Uniform Commercial Code is not legally sound.

It is claimed that Ionics engaged in unfair and

deceptive acts or practices in violation of Mass. Gen. L. c. 93A in Count III. Specifically, Rojas alleges that

> a. The defendant breached his (sic) fiduciary obligation to notify the Plaintiff [un writing (sic) the [c]ancellation of the [a] greement and reasons for doing it [p]rior to the cancellation.
>
> b. The defendant breached its contract with the Plaintiff.
>
> c. The [d] efendant made misrepresentation (sic) in regard to the true reason for [h] aving recall (sic) the [s]tock options.
>
> d. The defendant retained the Plaintiff (sic) vested [s]tock [o]ptions in willful [disregard of (sic) his demand in the meeting of January 1998 and mislead (sic) him [i]nto believing that the decision made in 1994 was better by obtaining [a] higher lump [s]um pension fund [o]f $22000, which in fact the [d]efendant [k]new that it was not true.

> e. The defendant using unscrupulous scheme misled (sic) the plaintiff into believing [t]hat early retirement was the reason to have the employment status changed and [h]igher [l]ump sum [e]arly withdrawal of pension fund(sic) was the reason to give up the [o]ptions [when in fact neither have anything in common, nor are interchangeable (sic).

Amended Complaint #14 ¶56.

The plaintiff is seeking three times the amount of his actual damages as a consequence of this purported statutory violation.

Finally in Count IV Rojas advances a claim for age discrimination. The gist of this claim seems to be that the plaintiff was terminated as an independent contractor by the defendant in July of either 1999 or 2000 when he was sixty-eight years old. (#14 ¶'62-4)

It is alleged that Ionics "in July 1999 and July 2000 breached the agreement made in 1967 [o]f terminating the relationship in a friendly and professional terms (sic) with proper [n]otification and cancellation of all the contractual obligations agreed under employment (sic)." (#14 ¶60) Further, "[t]he [d]efendant terminated the plaintiff (sic) work in July 1999 without any notification, [c]losing his office and removing all files including his personal files, because the Plaintiff had gone to the IRS for a status determination." (#14 ¶62) Moreover, "[i]n July 2000 the [d]efendant, rather than negotiate a just settlement choose (sic) to [t]erminate the plaintiff by denying his right to the fruit of his work." (#14 ¶63)

At the time of his termination Rojas asserts that "[t]he defendant without any consideration of the Plaintiff (sic) age and showing [m]alice [w]ith reckless indifference is in [v]iolation of MGL chapter 93 section 103(a)." (#14 ¶65)

V. Discussion

Although not raised by the defendant, a cursory review of the allegations of the amended complaint immediately raises a threshold issue as to whether Rojas' state law claims fall within the purview of the Employee Retirement Income Security Act ("ERISA") and are, consequently, pre-empted. The First Circuit has had occasion to address the fundamentals of ERISA pre-emption:

Congress enacted ERISA in 1974 in order "to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 90, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983). In particular, ERISA was designed to safeguard employees from the abuse and mismanagement of funds that had been accumulated to finance employee benefits. *See Fort Halifax Packing Co.* v. *Coyne,* 482 U.S. 1, 15, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987). The law was also intended to safeguard employers' interests by "eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans." *Show,* 463 U.S. at 99, 103 S.Ct. 2890 (quoting 120 Cong. Rec. 29197, 29933 (1974)) (internal quotation marks omitted). In support of this second goal, ERJSA provided for the preemption of all state law causes of action "insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). ERISA preemption analysis thus involves two central questions: (1) whether the plan at issue is an "employee benefit plan" and (2) whether the cause of action "relates to" this employee benefit plan. *See Rosario-Cordero v. Crowley Towing & Transp. Co.,* 46 F.3d 120, 124(1sCir. 1995).*McMahon v. Digital Equipnient Corp.,* 162 F.3d 28,

35-6 (1998); *Hampers v.W.R. Grace & Co., Inc.*,202 F.3d 44, 48-9 (1 Cir., 2000).

Research reveals that courts have universally concluded that stock option plans such as the one in this case are not employee benefit plans. *See Raskin v. Cynet, Inc.,* 131 F.Supp 2d 906 (S.D Tex., 2001); *Hahn v. N~tional Westminster Bank, N.A.,* 99 F.Supp.2d 275 (E.D.N.Y., 2000): *Long v. Excel Telecommunications Corp.,* 2000 WL 1562808 (N.D.Tex); *Kaelin v. Tenneco, Inc.,* 28 F. Supp 2d 478, (N.D. Ill., *1998)Goodrich v. CML Fiberoptics, Inc.,* 990 F.Supp. 48 (D. Mass., *1998);Johnsonv. TCOM Systems, Inc.,* 1989 WL517870 (D.D.C.) The rationale of these cases is persuasive; the plaintiffs state law claims are not subject to pre-emption and each shall be addressed in turn.

The defendant argues that Rojas' claim for breach of fiduciary duty, Count I of the complaint, is barred by the three year statute of limitations in tort actions under Massachusetts law. *See* Mass. Gen. L . c. 260 §2A. Ionics' point is well taken. It is clear from the allegations that this cause of action accrued either in December, 1994 when the plaintiff took an early retirement, in February, 1995 when Mr. Kachadurian warned Rojas that he had to exercise his vested options or at least no later than January, 1997 when Korn detailed the company's position in a letter to the plaintiff. Indeed, Rojas acknowledged in a July, 1997 letter that if the rules of the stock option plan were to be followed that Ionics' view was correct.

There is nothing alleged from which fraudulent misrepresentation or concealment such as may toll the running of the statute could be inferred. Rojas knew the company's position from the begjnning, and it was reiterated to him, unaltered, on several different occasions. While the plaintiff may have hoped to persuade Goldstein to change his mind, such aspirations would not stop the running of the statute of limitations.

Viewing the allegations in the light most favorable to the plaintiff, the limitations period on the breach of fiduciary duty claim began to run no later than in January of 1997. The present case was instituted on November 16, 2000.

approximately eleven months after the three year statute of limitations had run. Count I of the amended complaint must be dismissed as untimely. *See, e.g., Blackstone Realty LLC v. Federal Deposit Insurance Corporation,* 244 F.3d 193, 197 (1 Cir., 2001); *State Street Bank And Trust Company,* 240 F.3d 83, 87 (1 Cir., 2001); *LaChapelle v. Berkshire Life Ins. Co.,* 142 F.3d 507, 509 (1 Cir., 1998) ("Granting a motion to dismiss based on a limitations defense is entirely appropriate when the pleader's allegations leave no doubt that an asserted claim is time-barred. *See, e.g., Street v. Vose,* 936 F.2d 38, 39 (1st Cir.199 1); *Kali Seafood, Inc. v. Howe Corp.,* 887 F.2d 7, 9 (1st Cir.1989).").

Although denominated a breach of contract claim, it is difficult to discern precisely what breach is being alleged in Count II. Rojas contends that Ionics breached the stock option plan by denying him the status of an employee after he took an early retirement. The plaintiff does not dispute that in December, 24 1994, he did in fact retire and take a lump sum pension benefit. At that time the plaintiff had copies of the stock option agreements and the 1979 stock option plan in his possession) Years later in 1997 Rojas admitted in a letter to Korn that Ionics' view of how the plan worked was correct, specifically stating "I understand that there are some rules applicable to the option plan and if we go by these rules you are right." (#14, Exh. 7) ~

The action of denying Rojas employee status subsequent to his retirement, even if accepted as true, simply cannot be viewed as a breach of the stock option provision relating to the employee's rights to exercise the options as alleged. (#14, #2B at p.4) Indeed, the crux of the plaintiffs claim does not seem to be that the stock option plan itself was improperly implemented or administered, but rather that Ionics took actions which effectively denied him the benefits of the plan. Such a claim quite simply is not one for breach of contract. While theoretically such a claim may be more in the nature of a tort, that does not help Rojas since any tort would be barred by the three year statute of limitations.

The allegations in Count II fail to state a cause of action for breach of contract. As a result, the count should be dismissed.

Count III of the amended complaint is brought under Mass. Gen. L. c. 93A. The allegations make clear, however, that the claim arises out of Rojas' employment relationship with Ionics prior to the time that he took early retirement.[9] The purported unfair and deceptive practices all involve the plaintiffs alleged employment contract with Ionics as well as his early retirement and its consequences. The Massachusetts Supreme Judicial Court has unequivocally determined that :

> we have previously stated that c. 93A "is a statute of broad impact which creates new substantive rights and provides new procedural devices for the enforcement of those rights

." *Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 693, 322 N.E.2d 768 (1975).

[9] In other words, all the events about which Rojas complains occurred while, or relate to when, he was an employee of Ionics before his status was changed to that of an independent contractor.

However, broad as this protection is, we believe that the Legislature did not intend the statute to cover employment contract disputes between employers and the employees who work in the employer's organization, nor to disputes between members of that organization arising out of the employment relationship. Although the statutory language is not without ambiguity, we interpret the reference in §11 to unfair or deceptive acts committed by ~another person who engages in any trade or commerce" to refer to marketplace transactions and not to claims arising from the ordinarily cooperative circumstances of the employment relationship between an employee and the organization of which he is a member. *Id.* at 695-697, 322 N.E.2d 768. Section 11 remedies are available "in the case of a businessman [who suffers a loss] as a result of the employment by another businessman of either an unfair or deceptive act or practice or of an unfair method of competition." *Id.* at 696-697, 322 N.E.2d 768 (emphasis added).

Manning v. Zuckerman, 388 Mass. 8, 12-3, 444 N.E.2d 1262, 1265 (1983); see *also Falinouth Ob-Gyn Associates, Inc. v. Abisla,* 417 Mass. 176, 176 n. 1, 629 N.E.2d 291, 291 n.1 (1994).

Count III fails to state a claim upon which relief may be granted and should be dismissed.

Lastly in Count IV Rojas alleges what appears to be an age discrimination claim in violation of the Massachusetts Equal Rights Act, Mass. Gen. L. c. 93, §103. That statute, however, is not the appropriate vehicle to carry the claim. Rather, Mass. Gen. L. c. 151B provides the exclusive remedy for employment discrimination claims comparable to the one asserted. *See, e.g., Charland v. Muzi Motors, Inc.,* 417 Mass. 580, 586, 631 N.E.2d 555, 559 (1994):

Reidy v. Travelers Ins. Co., 928 F.Supp. 98, 106 (D. Mass., 1996), *affd,* 107 F.3d 1 (1 Cir., 1997), *cert. denied,* 522 U.S. 809 (1997) ("Because M.G.L. c.h.151b is the exclusive state law remedy for employment discrimination complaints, it preempts claims brought under M.G.L. c. 93, § 103. *See Woods v. Friction Materials, Inc.*, 30 F.3d 255, 264 (1st Cir.1994).").

Ionics argues that this count must be dismissed because Rojas has not alleged that he complied with the procedural requirements of chapter 15 lB. In other words, there is no contention by the plaintiff that he has ever filed a charge of discrimination with the Massachusetts Commission

AgainstDiscrimination ("MCAD")

, much less one "within six months after the alleged act of discrimination". *See* Mass. Gen. L. c. 151B §5. The consequences of this failure are fatal to the plaintiffs claim:

[Under Massachusetts caselaw, it is clear that a plaintiff alleging employment discrimination has "two largely independent avenues for redress one through the MCAD and the other in the courts." *Christo v. Edward C. Boyle Ins. Agency, Inc.,* 402 Mass. 815, 817, 525 N.E.2d 643 (1988). A plaintiff "may maintain a civil action only if [he] has previously filed a timely complaint with the[MCAD]and ninety days have passed (or a commissioner has assented [in writing] to an earlier filing)." *Id.* at 816, 525 N.E.2d 643; M.G.L. c. 151B, §9. A plaintiff may not otherwise resort to the courts for a discrimination claim that is within the jurisdiction of the MCAD unless he has followed these procedures. *See Cliarland,* 417 Mass. at 583-584, 631 N.E.2d 555.

Reidv, 928 F.Supp. at 106-7.

Count IV must be dismissed for failure to comply with both the administrative prerequisites and time constraints of Mass. Gen. L. c. 151B.

V. Recommendation

For the reasons stated I RECOMMEND that the Motion Of Defendant Ionics, Incorporated To Dismiss Plaintiffs Amended Complaint (#15) be ALLOWED.

VI. Review by the District Judge

The parties are hereby advised that pursuant to Rule 72, Fed. R. Civ. P., any party who objects to these proposed findings and recommendations must file a specific written objections thereto with the Clerk of this Court within 10 days of the party's

receipt of this Report and Recommendation. The written objections must specifically identify the portion of the proposed findings , recommendations, or report to which the objection is made and the basis for such objections. The parties are further advised that the United States Court of Appeals for this Circuit has repeatedly indicated that failure to comply with Rule 72(b), Fed. R. Civ. P., shall preclude further appellate review. *See Keating v. Secretary of Health and Human Services,* 848 F.2d 271 (1 Cir., 1988); *United* States *v. Emil iano Valencia-Copete,* 792 F.2d 4(1 Cir., 1986); *ParkMotor Mart Inc. v. Ford Motor Co.,* 616 F.2d 603 (1 Cir., 1980); *United States v. Vega,* 678 F.2d 376, 378-379 (1 Cir., 1982); *Scott v. Schweiker,* 702 F.2d 13, 14 (1 Cir., 1983); *see also Thomas v. Am,* 474 U.S. 140 (1985)

"s / ROBERT B. COLLINGS"
Chief U.S. Magistrate Judge

June 14, 2001.

United States District Court
District of Massachusetts

EDUARDO E. ROJAS,
Plaintiff,

v

CIVIL ACTION NO.
OO-12376-MLW

IONICS, INC.,
Defendant.

ORDER RETURNING CASE TO CLERK'S OFFICE

COLLINGS, Ch.U.S.M.J.

The undersigned has this date issued a Report and Recommendation that this case be dismissed. Accordingly, the file is RETURNED to the Clerk's Office with instructions to bring the Report and Recommendation to the attention of Judge Wolf.

The Clerk shall enter on the docket the fact that the case "is no longer referred to Magistrate Judge Collings."

"s/ROBERT B . COLLINGS "

Chief U.S. Magistrate Judge

June 14,2001

(5) 02 456 AUG 1 2002

OFFICE OF THE CLERK

CASE_____

IN THE SUPREME COURT
OFTHE UNITED STATES

EDUARDO E ROJAS ------PETITIONER

vs

IONICS,INC. ET.AL.,------RESPONDENTS

On Petition for writ of certiorari to the United States courts of appeals for the first circuit

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Appendix to Petition for Writ of Certiorari

Volume II

EDUARDO E ROJAS

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57 pp

APPENDIX D

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1 The most important issue is whether the service provided by Rojas to Ionics during 1995 and 1999 were considered that of an employee or an independent Contractor.base on evidences presented and proof of his relationship with Ionics. (amended Complain #14 exh. 9A-9E)

2 The second most important question is whether Ionics breached the Implied covenant of good faith and fair dealing. by recalling nonvested Interest for past services. Although retained to do services under a nonemployee status. being the services provided the same as before the changing of status.

3) The last issue is : Rojas Discrimination charges were rejected by the District court for noncomplying with states regulation. when in fact the evidences presented shows that it did complied with the procedure U.S.C. 29 section 633 (b) and the age act impliying its filing requirements,that federal courts should recognize not preclusion by state administrative {501 U.S. 104,105 } findings.

STATEMENT OF THE CASE

On or about December 1994 The plaintiff " Rojas " was induce to accept Earlier Retirement after 27 years of being employed by the defendant " "IONICS INC " , subsequently of accepting the deal Rojas was retained by the Defendant on Consultant basis.

Rojas was to be paid $ 3000 per Month for half time plus health Insurance and travel Expenses.

On November 12 of 2000 Rojas filed a Complaint as a result of the Defendant " Ionics Inc" failure to recognize the Services of Rojas from 1994 until 1999 as that of a key Employee and illegally withholding interest that would have been vested at the age of 65.These Interest had been recalled in 1995 with the presumption that Rojas was not longer an Employee but an independent Contractor as a result of having withdraw his pension fund earlier than 65 years old, and as it was confirmed by the IRS on February of 2000 (amended complaint #14 exh.11) . later on Rojas discovering that the company had violated state laws, breached the implied covenant of good faith and

fair dealing ,and had discriminated him among others who had retired earlier.and finally use unlawful methods to terminate his Employment on July 14 of 2000.

STATEMENT OF FACTS

Independent contractor or Employee

1.) The first issue presented is the question of Rojas Employment Status After he accepted an Earlier retirement deal. These facts are related specifically to the work and duty of Rojas During 1995 through 1999

2.) Rojas Status presumable is changed on December 15 , but retroactive to November 30 of 1994. Rojas at the Time was the only Senior Electrical Power Engineer ,and the one who had

designed about 90% of the major Installation through out the World , He was the only Magnetic Electrical Engineer Responsible for all the Power Transformer Installed in all the plants build since 1969. He was bilingual , and was being used at the time on a major Installation in Argentina,in which He was the Electrical Project Engineer.until on or about July 1995. Because his vast Experience , He was in Demand and practically 75 % of the work was coming to his desk.Proof of the Additional jobs that he handle besides his main obligation to one project. Rojas Demand had increased over the years and to facilitate his expertise to the various groups, he was allowed to be used in any project by other groups .hence his Work rather than decreasing in 1995 and 1996 did in fact increased

resulting in more than the 1/2 time as it was agree in 1994. In 1995 He did invoice the Company for 1541 Hrs on about 12 projects. not counting week ends and travelling time on overseas duty. neither overtime hrs. On 1996 Rojas was involved in two large projects but was involved in or about 14 additional tasks.invoicing the company for 1104 hrs. (Rojas asked for nonvested interest that would have been vested on or about May 22 1996.). as a result of still being a key Engineer and work more than 1/2 time. (#14 exh. 5).

In 1997 Rojas work decline do to the Departure of Kachadurian and a new non friendly Management taken over. but still Rojas kept doing his job very much with the same obligation but the company fell

in a period of transition and most of the jobs in which Rojas was a lead project Electrical Engineer were cancelled. except one project in Paraguay. For 1997 Rojas Invoiced the company for 672 hrs and worked in about 9 small projects. The agreement of 1994 was for half time at $3000 per month. However this agreement was questioned by the new Manager , Who denied payments at the end of 1997 and informing Rojas that He had retired and was not longer an Employee neither had a contract. Therefore He would not honor the Invoices presented. thus provoking the meeting of January of 1998 . see (Amended Complaint #14 Exh. 9 A , B, C.) and Factual Background (document # 8) lines 7-10 page 4

3.) Method of payment

Rojas was instructed to provided a monthly invoice on the hours spent on each job that he was assigned to work and charge the Equivalent of $3000 Per Month per hour basis. or $34.61 per hour.In 1998 he was allowed to charge $ 36 per hour.

See (# 14 exh. 9A- E)

4.) Travel Expenses would be file using the Employee Form supplied by the company. All expenses would be charge to the job that he was traveling for. The travel arrangement would be made by the Company selected travel agency. Schedule, meetings, and place to stay where under the discretion of the group job Manager.

5.) On January of 1995 he was told to provide a company name to put all traveling and office

expenses in Florida. And from then on two checks were submitted to him . one bearing his employee number (E626). (#14 exh.23)

And the other would have the Number assigned to that company name. On January 1996 this method of payment did change and all payments were made on one check . however the Forms given to accounting was still the same.

6.) After the meeting of 1998 he was transferred to work for Exec. VP.Papastauros on a large project for Acapulco. Rojas was to be the Electrical project Engineer , Basically nothing had change , except that he was told to give a vendor number. and he was not to be used by other groups. he was to be used strictly on that Project. but still employed by Ionics with his Office,Equipment,

Secretarial and drafting help provided by " Ionics "

When in Boston he did complied with the Employee working hours, answer calls and was open to meetings and question related to other jobs or technical matter. Including holding Electrical seminar sections to Field engineers .

Rojas Position of Key Engineer has been proved by the function, obligation and responsibility that he had on all the assigments given to him up to 1999. see (amended complaint # 14 exh. 9A-E) and Factual background document #8 page 11 paragraph 21 and 22.

THE STOCK OPTION AGREEMENT

1) The stock option grants were given to Rojas in 1991 and 1993 on his effort to design the

Formulation used by him on power transformers used in the company water demineralization process plants. and adapt to a computer program so any Engineer .could select a transformer without his assistance's it was required then. The Program was finished on or about 1991, and test were being made up to 1993. (#14 Exh. 20)

and it is in used . This task was done on overtime basis , but Rojas was an exempted employee , so rather than taking time off , he was given 1000 shares in 1991 and 1000 shares in 1993, under an Stock Option agreement and a 1979 Stock option plan.

The share price of Ionics split two for one in 1994 and Rojas had 4000 shares at the end of 1994 1200 were vested from 1991 and 400 from 1993.

The rest would be vested at the age of 65, although Rojas had been told by the administration that the 1993 set would vest in 1998. Rojas had no intention to Retire and the Fact that he accepted the deal on December 1994 . was that he was offered a lump sum of $22000 more than if he had waited until 1996. and also a suggested deal in Florida. and with not objections he did accepted. A letter of confirmation proceeded (#14 exh. 3) and Human resources did follow up with Distribution of other benefits .(#14 exh. 4) Rojas Continued doing his job, and There was no further meeting .

On or about February of 1995 Mr. Kachadurian inform Rojas that the administration had decide to recall the unvested options as a result of not longer

being on full time nor a key engineer. and of course he could exercise the vested units. On March 1995 Rojas was instructed to work as much as he could, so to keep up with the demand of new projects coming in. and so he did , and in doing so he did maintained his old position and time period to meet a requirement of the Agreement under paragraph 4 as of the 1979 Stock option plan specified.

[In the event that any Options granted under the plan shall be surrendered to the company or shall terminate,lapse or expire for any reason without having exercised in full , the shares not purchased under such Options shall be available again for the purposes of issuance pursuant to the plan.]

However Ionics in 1997 had other plans.

PAGES 14 THROUGH 25

HAVE BEEN OMITTED

SECTION V : Count II Breach of Contract

1.) The court erred on his determination that Ionics did not Breach the stock option agreement but rather Ionics took actions which effectively denied him the benefits of the plan.therefore calling it a tort

2.) The action of denying Rojas employee status subsequent to his retirement is irrelevant in regard to the Stock Options .The fact is that Ionics retained Rojas on consulting bases for 1/2 of his time and as required or on call was a proof that Rojas remained being employed by Ionics. furthermore there was a noncompetetion provision in the agreement that would not allow Rojas to work on any job related to Ionics business for two years ,without the consent and approval by the board of

director. therefore holding Rojas to that agreement .(# 14 exh. 2A par.9 and 2 B par.12.)

Ionics could have cancel the agreement any time for any reason, but would have to do it in accordance with the laws of Massachusetts and under the provision and rules of the agreement (# 14 exh.2A paragraph 12)

3.)this is an implied covenant under Massachusetts law. therefore a binding agreement or contract. subject to Massachusetts contract terms and laws See Sargent v Tenaska, Inc ,914 F.Supp.722,729,730 (.Mass 1996)

which the First District Court on cross Motion for summary judgement ruled the Employment letter was a contract, suggesting that Sargent might be

entitled to ownership interests,or comparable damages.

4.) as opposite to Sargent , Rojas accepted the agreement on 1991 and 1993 In consideration of having design the formulation for Magnetic power devices on his own time.see (#14 exh. 20 and 20A) (Rojas was the Sole Magnetic Designer for the company). The grants were given subject to a contract for 5 years and the vesting Schedule was 20% per year for 5 year and automatically vested at the age of 65. Rojas remained working well passed his 65 birthdate.

5.) Rojas case is well adapted to the fortune case. (reference in Sargent)

The Fortune doctrine is easy to grasp in the simple

case that spawned it:

an at will salesman, entitled to a commission payable at later date, is fired after the sale but before the date of payment ; and the reason for the firing is to cut off the commission . In that case , Massachusetts courts imply a covenant of good faith and fair dealing, treat the discharge as a BREACH, and affix the remedy as an award to the salesman of future compensation for the completed sale.

6.) Since Fortune so held in 1977, Massachusetts appeals courts have both extended and limited the doctrine in several important decisions. for example

Fortune-based recoveries have been allowed in

Gram v Liberty Mut. Ins Co 429N.E.2d 21,29 (Mass 1981)

Maddaloni v Western Mass. Bus Lines. 438 N.E. 2d 351,355-56 (Mass 1982)

Cataldo v Zuckerman, 482 N.E. 2d 849, 855-856 (Mass.app. Ct. 1985)

These cases make clear that Fortune is not limited to simple cases of commission sales with deferred payments.

7.) The First District court of appeal follow with the following discussion

[" The recurring difficulty presented in the case before us ,is how to decide whether the unvested interest relate to" past" or " future services.We treat this characterization issue as one of law. The CONTRACT terms agreed to by the parties are in dispute, the debate is whether the law should extend protection (assuming bad faith discharge) beyond the express terms of the contract to certain expectancies. The extend of such protection is a primarily a matter for judges, not juries.See Gram II, 461 N.E.2d at 798 ; cf. Green v Richmond, 337 N.E.2d 691,695 (Mass 1975)" (Judge decides the legal question of whether undisputed contract terms violate public policy)]

It is easy to find a protectable interest where, as in Fortune, the promised future payment is directly tied to a particular past service.

8.) How ROJAS case fits in Fortune doctrine.

Rojas was offered a higher pension Lump Sum payment , and once accepted he was given two options , A 28 week lump sump payment, or a Consultant contract for $3000 per month for 1/2 time. by accepting the contract Option , it is understandable that he was retained by the company to work for them. So the question is What intention did the company had in regard to Rojas future employment status .whether he was to be part time employee, a consultant (less than 8 Hrs per week) or an independent Contractor. and choosing the last

as the company claimed. It was the only offered choice .It clearly shows that it was with Intention to Breach the Stock Option Agreement. Basically Rojas was terminated and then hired back under a new term. with no benefits and all other nonvested Interest Gone,

9.)Yet it can be seen by the evidence presented . (#14 Exh. 9A-E) that Rojas was doing exactly the same function of a key Engineer. So the question that Rojas ask the Court . Is there any difference of Rojas to that of Fortune ?

Was not that a Breach of contract ? If the Fortune doctrine was easy to grasp Rojas case should be even easier to decide as Rojas service the company for 5 more years providing same Engineering level

for one fraction of the rate being paid to others in similar situation.

10.) The reason given by the company to take the vested interest is that Rojas was not a key Engineer or an employee ,but the fact is that the company retained Rojas doing that work past the vesting period . and just claiming that he was an Independent contractor suscefully had got away with it. However The company Intention was tested when the IRS made the determination in February of 2000. and Rojas submitted a bill for a sum of $ 158319 for wages differential of an Employee and that of an Independent Contractor see (#14 exh. 12) and was ignored. thus hinting that there was bad faith in their dealing.

11.) Arguendo that Rojas was an Independent contractor ,Which under the State Law M.G.L. ch 149 section 24B and ch 151: section 19 (4) He could not have been one. at the age of 63 and 1/2.

The U.S. 9th Circuit Court of Appeals on the Vizcaino v Microsoft case

Judge REINHARDT, had the following opinion:

[Large Corporations have increasingly adopted the practice of hiring temporary employees or independent contractors as a means of avoiding payment of employee benefits, and thereby increasing theirs profits.This practice has understandably led to a number of problems, legal and otherwise. One of the legal issues that arises is exemplified by this lawsuit.
The named Plaintiffs,who were classified by Microsoft as independent contractors, seek to strip that label of its protective covering and to obtain for themselves certain benefits that the company provided to all of its regular permanent employees. see Vizcaino v Microsoft Corporation No 94-35770 (9th circ. 1996- 1997).]

12.) [A three -judge panel of the Ninth Circuit Court of Appeals in March of 1997 by a 2-1 vote that an employer must pay benefits under two employees benefits plans to a group of workers that the employer misclassify as Independent contractors.The Employers were designated as "freelancers" by Microsoft and were treated as independent contractors. Freelancers were distinguished from employees among other things that they were required to submit invoices documenting their hours and were paid through the accounts receivable department rather than payroll department .The freelancers were told when hired that would not be eligible for benefit]

13.) The District court judge erred in barring this count under a Tort actionRather than a Breach of contract. Rojas do disagree for various reasons. The Language of the agreement in the Document is clearly written as A covenant between the two parties, for a period of 10 years. Except that At the age of 65 , the company allows the holder of the agreement to Exercise all unvested units

without having to wait for the period of Vesting. This agreement is construe pursuant to the Massachusetts law.And is binding upon the respective parties . see (#14 exh. 2A page 5)

14.) Under this language Ionics had the right to not tender Employment to Rojas but had to inform Rojas of their intention to repudiate the Agreement in writing . and that was not done until the letter of disclaiming any wrong doing on July 14 of 2000. see [M.G.L. ch 260 section 13]

15.)Therefore the Tort action should be taken as from July 14 of 2000 . that its Memo indicating the Termination of the Relationship and that the Administration would not honor his debt to Rojas. pursuant to the letter sent by Rojas to Goldstein on July 6 of 2000.

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STATEMENT

The Argument on this document have been edited to remove Irrelevant material .

ARGUMENT ALLEGATIONS

on Reply brief Dated 1/25/02

BREACH OF FIDUCIARY

1.) The comments of Ionics on the Breach of fiduciary are misleading assumptions that it not take place , nor there is any evidence to substantiate that Ionics acted properly in handling Rojas Earlier Retirement, such as in the OWBPA procedure enacted by congress in 1990 which was designed to protect the Rights and benefits of older workers,or in fact any other method of termination that would have prevented this action and waste of precious time. but handed a one page memo, which clearly

indicates that Rojas was to continue to be employed by Ionics.

2.) Rojas did not have to retired in December 1994, Rojas had the right to cash his vested benefits,and so he did under the influence of their Executive VP. Mr. Kachadurian to obtain a larger lump sum. and so others from different groups ,that were retained on consulting bases and part time schedule and classified Employees.

3.) The Memorandum of Mr. korn in 1997, the financial report showing a great move by Rojas to have retired and sacrifice the " Options" in 1998, and finally the grant final on July of 2000 were all consecutive steps to conceal the big mistake that some one had made. so to said that there was not misleading, or misrepresentation on part of Mr.korn

memos in terms of the law , has to be blind. The evidences presented, along with the States and Federal laws are sufficient to proof that Mr. Korn did Engaged in misleading Rojas from the true , for unknown reasons.

BREACH OF CONTRACT

1.) The defendant argument on the Breach of Contract does not have any lawful meaning other than misleading statement and distorted view of what in fact the contract is all about and the reason that it has been breached. so to justified or agree with the District Court Judge wrong decision. There is enough detailed information and reasons why Rojas feel that there was a breach of contract. and the scenario put together by Ionics fails for for the simple reason that Breach of Fiduciary duty

to reveal facts constitutes Fraudulent concealment cause of action. not a tort action.

Riley v Preznenl (1991 565 N.E.2d).

and the other fact that Ionics fail to recognize is that Rojas was retained to be employed by Ionics. "Stock and Barrel" but by illegally making him an Independent Contractor . Basically he had been denied the right to exercise his then vested options therefore breaching it.

2.) "Option contract " A legally enforceable agreement under which one party promises to honor an offer to buy or sell something for a specific prize within a set time. Rojas met his obligation according with the rules and took his chances on the prize of the Stock that could have gone down below or equal to the buying prize. and in the mean

time he was held to work for " Ionics only" as the contract specified.(#14 exh.2A par 9and 2Bpar 12.) This agreement was done under a meeting of the mind . and the amended complaint shall be actionable, under a Remedy selected by the Court.

3.) The fact that Rojas employment as an Employee has been denied is the same as been fired in 1994. therefore the circumstance in Dec 1994 were much the same as in the Fortune case. so the Breach of Contract " Prevails".

4.) The IRS ruling is irrelevant , it was for taxes purposes and it was done base on the information presented.without taken in consideration the current states laws.and for all purposes invalid in this case

5.) Finally to rest this count because the shares were transferred without proper Knowledge or

consent in derogation of contractual terms it is characterized as an action for conversion, or an action for breach of contract. It does not involve the type of accident resulting in injures to person or properties on which draftsman of Massachusetts three year statute focussed. [Royal Globe Ins. co v Craven 585 N.E. 2d 315,320 (Mass 1992)] . Rather, it involves a claim to recover from another money which in equity and good conscience He is not entitle to keep. The latter type of claim according to the supreme Judicial Court is usually advance in a contract action [Kagan v Levensen, 134 N.E. 2d 415,417 (Mass 1956)] In these circumstances, it was not error for the District Court to apply the six year contract Statute of limitations to plaintiff contract claim.

Quoting A paragraph from [Ansin v River Oaks Furniture First circuit 1996 case 1734]

DISCRIMINATION

1.) Rojas could have been discriminated on or about December 1994, because the transition of status was not done within the proper method and under the law. however Rojas could not have detected it because the following reasons.

(a) Rojas position with the company at the time was excellent, he was very much in demand by the various groups, and his relationship with Mr. Kachadurian , and other Executives was of trust and friendship. In which he would be contacted by them when Major Electrical field problems did arise. his Experience was essential.

(b) Rojas was very active at the time being involved in new proposals, major field problems, and existing new Installations.

(c) The Earlier pension deal was not to retire, but to continue working . The fact that Rojas was to open an office in Miami was with view in continuing on and take care of Central and South America business and field problems.So what Reason had Rojas to file for a discrimination in 1995 ? or 1997 Still in 1998 Rojas was a key Engineer in an important Installation in Mexico up to 1999. and he was working for the EXE. VP. of the company Mr. Papastauros. who in 1998 informed Rojas that he would be involved in future Plants Installations.

2.) So what triggered the company to let Rojas go

was the fact that The company heard rumors that Rojas was to talk to the IRS. and rather than terminate all the agreements made in 1999. opt for not calling Rojas anymore and closing his office. Rojas was still under the agreement of 1967, 1994 and then January 1998. So in fact the effect of this charge is the letter of Rojas to Mr. Goldstein on July 6 of 2000. and then the replied by Mr. Korn repudiating Ionics agreements and debts to Rojas.

3.) This is an Intentional Discrimination , Cause by Rojas contacting others Authorities in his effort to find out the reason for Ionics denied his Stock Options and other Benefits , as a result of been mislead in December of 1994 to accept a position which was not of an Employee.

4.) whether the Motivation for the Defendant was Age , Race Or retaliation. The reasons written in the complaint are exactly the reasons given by Ionics to take away additional benefits and Stock Options for having taken the pension fund earlier. Rojas could not aver the motive for this act other than Ionics had discriminatory taken away his right to enforce contracts and had deprived him of employment opportunities.

5.) The EEOC is the Federal authority in charge of all discriminations , and it was their decision to dismissal and submit the right to sue notice. base on the Fact alleged. and the Reason for using Age Discrimination is the fact that age was the factor that made the difference.If Rojas was not at that Retirement age , it would not had happened. Rojas

has explained this issue very well in his supplement Memorandum dated 7/26/01 page 9,10 and 11

6.) the reason for using M.G.L.93 section 103 (a) was that Rojas at the time had been considered an Independent Contractor. by the IRS. However , later on finding out that his Employment Status was still a former Employee and he had the right to existing labor laws.

Robinson v Shell oil co. (certiorari to the United states court of appeals for the fourth circuit. no 95-1376. 1996)

7.) Finally to close this charge once and for all . It is very clear that the circumstances of Rojas filing was very much on line with that of Solimino

[Solimino v Astoria Federal 501 U.S. 104 2nd Circuit no 89-1895 (1991)]

In which Respondent filed a charge with the EEOC , and under the work- sharing agreement,the EEOC referred his claim to the State agency responsible for claims under New York's human rights law. because the State decision was upheld in administrative review . Rather than appealing he did file in the District court. The court granted Astoria Motion for summary judgement. holding that the State's age discrimination findings precluded Federal litigation of the claim.

The Court of Appeals reversed, inferring from the Age Act's structure a legislative intent to deny preclusive effect to such administrative proceedings

8.) Rojas did filed properly with the EEOC and as indicated in the form a copy was sent to Florida Comm.on Human relations State or local office

who probable dismissed it as nonjurisdictional rather than send it to the State of Massachusetts . Because the sharing agreement between the States and EEOC

EEOC then issued a dismissal with the right to suit within 90 days. If the EEOC gave Rojas the right to suit , why Rojas had to file again with MCAD.

The Argument by the Defendant is that Rojas had to file with MCAD , wait the 60 days period and then file with the EEOC. well the fact that under the new Discrimination rules , filing is simultaneously with the EEOC and the States , So States proceedings shall be deemed to have been commenced at the time such statement is mailed to the State Authority 29 U.S.C.633(b).

If EEOC sent it to Florida , because Rojas was a

citizen of Florida, that is beyond Rojas Control and it is unfortunate but not a reason for dismiss an Adea charge that Rojas would have used instead of 151B that the Defendant has been suggesting from day one. Rojas did file his complaint within the time specified and the EEOC did proceed accordingly to the rules.

but Arguendo that EEOC did not notified the state where the discrimination did occurred and Rojas did not file a complaint with MCAD within the time see[Oscar Mayer co v Evans, 441 U.S. 750 1970)] for a very interesting case.

In which a respondent was informed by the Labor Department that he did not have to file with the State but only the EEOC. Then dismissed by the

Court of Appeals. under the provision that , under 14(b), resort to Administrative remedies by claimants in States with agencies empowered to remedy age discrimination in employment is mandatory , not optional and federal suit may not be brought under the ADEA unless the claimant has first commenced a proceeding with the appropriate State Agency, Pp 754 -758. But then reversed by the Supreme court and so ordered the District Court to hold respondent's suit in abeyance until the respondent had complied with the mandated of 14(b) and allowed the State Civil Rights Commission an opportunity to entertain respondent's grievance before his Federal litigation can continue.

9.) However a grievant is not required by 14 (b) to commence state proceedings within the time limits specified by State Law. Pp 758-764.

(a) By its terms ,14 (b) requires only that the State proceedings be "commenced " 60 days before litigation is instituted, and use of the word " commenced " strongly implies that state limitations periods are irrelevant. This implication is made express by the provision in 14 (b) that if a state authority imposes requirements "other than a requirement of the filing of a written and signed statement of the facts upon which the proceedings is based " the proceedings shall be deemed to have been commenced for purposes of 14 (b) at the time such statement is sent by registered mail to the

appropriate state authority. State limitations periods are requirements other than specified in 14(b)and, thus, even if a state were to make timeliness a precondition for commencement, a state proceeding will be deemed commenced for purposes of 14(b) as soon as the complain is filed Pp759-760

(b) This construction of the statute is consistent both with the ADEA'S remedial purposes and with the purposes of 14(b) , which does not stipulate an exhaustion requirement, but is intendent only to give states agencies a limited opportunity to settled the grievances of ADEA claimants in a voluntary and localized manner so that the grievants thereafter have not need or desire for independent federal relief. [441 U.S.750,752] The ADEA'S structure-

setting forth limitations periods in explicit terms in 7(d) and (e) ,not 14 (b)- reinforces the conclusion that state procedural defaults cannot foreclose federal relief and that state limitations periods cannot govern the efficacy of the federal remedy. Pp 761-764.Therefore, it is clear why in Solimino the court of appeal did reversed the district court ruling . and Rojas case is in fact a similar case .

APPENDIX E

STOCK OPTION AGREEMENT

IONICS, INCORPORATED

Non—Qualified Stock Option Agreement

This Agreement made as of this 31st day of July, 1991, by and between Ionics, Incorporated, a Massachusetts corporation (the "Corporation"), and EDUARDO E. ROJAS (the "Employee").

WITNESSETH THAT:

WHEREAS, the Corporation has adopted a plan entitled the "1979 Stock Option Plan" for the granting to selected employees of options to purchase shares of its stock; and

WHEREAS, the Compensation Committee of the Board of Directors of the Corporation has authorized the grant of this stock option pursuant and subject to the terms of the Plan, a copy of which is attached hereto and incorporated herein, and subject to the further terms and conditions set forth herein;

NOW, THEREFORE, the Corporation and the Employee hereby agree as follows:

1. Grant. Subject to the terms and conditions of the Plan and this Agreement, the Corporation does hereby grant to the Employee an option to purchase from the Corporation an aggregate of 1000 shares of its Common Stock ("Stock"). This option is not intended to constitute an "incentive stock option" within the meaning of Section 422A of the Code.

2. OptionPrice. This option may be exercised at the option price of $43.00 per share of Stock

3. Term and Exercisability of Option. This option shall expire ten years and one day after the date of grant set forth at the conclusion of this Agreement, and except as limited pursuant to Section 7..hereof shall be exercisable in full from and after the date of grant, provided that the Employee is not in violation of Section 9 hereof, or of any other agreement with the Corporation..

4. Method of Exercise. To the extent that the right to purchase shares has accrued hereunder, this option may be exercised from time to time by written notice to the Corporation substantially in the form attached hereto as Exhibit 1. As soon as practicable after its receipt of such notice, the Company shall, without transfer or issue tax to the Employee (or other person entitled to exercise this option), deliver or cause to be delivered to the Employee (or other person entitled to exercise this option), stock certificates representing the number of shares to be issued upon such exercise, against payment of the option price in full for the number of shares to be delivered, by means of payment acceptable to the Corporation in accordance with Section 7 of the Plan; provided, however, that the time of such delivery may be postponed by the Corporation for such period as may be required for it with reasonable diligence to comply with any applicable law.

If the Employee (or other person entitled to exercise this option) fails to pay for and accept delivery of all or any part of the number of shares specified in such notice upon tender of delivery thereof, his right to exercise this option with respect to such undelivered shares may be terminated by the Corporation.

5. Non—assignability of Option Rights. This option shall not be encumbered, or be assignable or transferable by the Employee except by will or by the laws of descent and distribution. During the life of the Employee, this option shall be exercisable only by him.

6. Effect of Termination of Employment or Death. In the event that the employment of the Employee by the Corporation (which term for purposes of this Section 6 shall include any subsidiary of the Corporation, within the meaning of Section 425(f) of the Code) is terminated voluntarily by him, or by the Corporation on account of his malfeasance or his violation of this or any other agreement with the Corporation, or any similar justifiable cause, this option shall terminate immediately, In the event that the Employee during his life ceases to be an employee of the Company for any reason other than those described in the preceding sentence, this option, or the unexercised portion hereof which is otherwise exercisable on the date of his termination of employment shall terminate thirty (30) days after the date of his termination of employment, but in any event no later than the date of expiration of the Option. In the event of the death of the Employee while he is employed by the Company, or within the thirty—day period described in the preceding sentence, this option, or the unexercised portion hereof which is otherwise exercisable by the Employee at the date of his death, may be exercised by his personal

representative at any time prior to the expiration of ninety (90) days from the date of death of the Employee, but in any event no later than the date of expiration of the option; provided, however, that the right of the personal representative to exercise this option shall not extend to shares of Stock which on the date of the Employee's death were subject to the repurchase rights set forth in Section 8 hereof,

7. Compliance with Securities Laws. The Employee hereby represents that he or the person exercising this option in his stead will be acquiring the Stock for investment and not with a view to its sale or distribution, and he and they respectively, as a condition to being issued the Stock, hereby covenant and agree with the Corporation that no transfer, sale, exchange, assignment, pledge or encumbrance of the Stock or any portion thereof, nor any commitment to take such action, shall be made, whether voluntarily, involuntarily, or by operation of law, by bequest or otherwise, without prior written notice of the Employee or holder thereof to the Corporation, and compliance with this Agreement. The issue and resale of Stock under the Plan is presently covered by effective registration statements under applicable securities law, and it is the policy of the Corporation to seek to maintain such registrations in effect..

The Corporation will notify the Employees or other person exercising this option if for any reason the registration are not maintained in effect, and in that event the Stock may not be transferred unless the Corporation is furnished with assurances satisfactory to it that the transfer would not constitute a violation of applicable securities law.

8. Repurchase Rights of the Corporation. Upon the occurrence of a Repurchase Event (as hereinafter defined), the Corporation shall have the right to repurchase, at a price equal to the option price set forth in Section 2 hereof, all or a portion of the Stock issued upon exercise of this option, in accordance with the attached Exhibit 2; provided, however, that (a) if the Corporation shall propose to its stockholders that the Corporation merge or consolidate with or sell substantially all of its assets and business to another corporation (other than a subsidiary controlled by the Corporation), or (b) if another corporation, entity or person, or group of corporations, entities or persons acting in concert shall hold, as a result of a single acquisition or a series of acquisitions, thirty percent (30%) or more of the outstanding voting shares of the Corporation, or shall make a tender offer to the stockholders of the Corporation to acquire shares of its stock, which if successful could result in said corporation, entity, person or group holding thirty percent (30%) or more of the outstanding voting shares of the Corporation, such repurchase rights shall terminate on the date of the first to occur of the events just described. A Repurchase Event shall be (x) any action of the Employee to sell, pledge, or transfer (whether voluntarily, by operation of law, or otherwise) Stock acquired upon exercise of this option, or (y) termination of the Employee's employment with the Corporation (or any of its subsidiaries) by his voluntary action, or (z) termination of such employment on account of the Employee's malfeasance or his violation of this or any other agreement with the Corporation or any similar justifiable cause.The Corporation shall exercise its repurchase rights by delivering to the Employee (or other holder of Stock subject to such rights) written notice of its intent to repurchase Stock pursuant to this Agreement. Provided , however , That if the Corporation does not exercise its repurchase rights within thirty (30) days after it has notice of the

Repurchase Event, the Stock shall thereafter be free of any repurchase right arising from that particular Repurchase Event. The closing of a repurchase shall occur on the fifth business day following delivery of the Corporation's written notice of intent to exercise its repurchase rights, at the principal office of the Corporation or such other place as shall be designated in the written notice. At the closing,, the Corporation shall pay the full purchase price in cash, against its receipt of delivery of the stock certificates representing the shares of Stock being repurchased, duly endorsed or accompanied by such duly executed stock assignment powers as shall be required to effect the transfer of ownership thereof to the Corporation. Nothing contained in this Agreement shall be construed to require the Corporation to repurchase any Stock at any time.

9. Employee Not to Compete. In consideration of the Corporation's grant of this option, the Employee hereby expressly consents and agrees that during the period of his employment by the Corporation (or any of its subsidiaries), and for a period of at least two (2) years after the date such employment terminates, he will not without the consent of the Board of Directors of the Corporation accept or perform work for any entity whose business is significantly competitive with the business carried on by the Corporation and its subsidiaries, or engage in activities which are significantly competitive with the business of the Corporation and its subsidiaries. The Employee and the Corporation do hereby stipulate and agree that the remedies at law for any violation of the provisions of this Section 9 would be inadequate, and that performance of said provisions shall be ordered specifically enforced by any court of competent jurisdiction.

10. Rights as Stockholder. No person shall have any rights as a stockholder with respect to any shares of Stock covered by this option until the date of issuance of a stock certificate to him for such shares. No adjustment shall be made for dividends or other rights for which the record date is prior to the date such stock certificate is issued.

11. Changes in Capital Structure. In the event that the outstanding shares of Stock of the Corporation are hereafter increased or decreased or changed into or exchanged for a different number or kind of shares or other securities of the Corporation, by reason of any reorganization, merger, consolidation, recapitalization, reclassification, stock split—up, combination of shares or dividend payable in capital stock, the Board of Directors shall make appropriate adjustment in the number of shares as to which this option, or the portion hereof then unexercised, shall be exercisable, and in the option price (provided that in no event shall the option price be less than the par value of such shares) to the end that the Employee's proportionate interest shall be maintained as before the occurrence of such event. An identical adjustment shall be made in the number of shares to which the repurchase rights set forth in Section 8 apply.

12. Notices. Any notice of his personal representative shall in writing and sent by registered the persons being given the notice address has been changed by notice
the Corporation or of the Employee or of be deemed to have been properly given if or certified mail, postage prepaid, to at the following address, unless such an given in compliance herewith.

The Corporation
Ionics, Incorporated
65 Grove Street
Watertown, MA 02172
ATI'N: General Counsel

The Employee:
EDUARDO E . ROJAS
53 Madison St Medford Ma 02155

13. Miscellaneous: This Agreement shall inure to the benefit of and be binding upon the respective parties hereto, their heirs, executors, administrators, assigns, successors and transferees. This Agreement has been executed in Massachusetts and shall be governed by and construed in accordance with the laws of the Commonwealth of Massachusetts. This Agreement contains the full and complete understanding and agreement as to the subject matter hereof and may not be altered, modified or amended except by a further written agreement duly executed and delivered by their respective parties hereto.

Although the Corporation (or one of its subsidiaries) presently intends to tender employment to the Employee, nothing herein shall be deemed to constitute an undertaking of the Corporation (or of any of its subsidiaries) to continue to tender such employment to the Employee.

IN WITNESS WHEREOF, the Corporation, by its officers hereunto duly authorized, and the Employee have duly executed this Agreement in duplicate counterpart copies, as of the date set forth below.

IONICS, INCORPORATED

Date of grant: July 31, 1991

BY:"s/ Arthur L Goldstein "
Chairman and Chief
Executive Officer

ACCEPTANCE

I hereby accept the foregoing option in accordance with its terms and conditions and the terms and conditions of the Plans.

Date 11 / 5/ 1991

"s/ Eduardo E Rojas "
(Signature of Employee)